SUPREME COURT, U. S.

No. 919

In the Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of the Estate of Evelyn Kennert, Deceased:

ROBERT J. BRADLEY,

Petitioner,

vs.

GEORGE VARGO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Wisconsin Supreme Court and its denial of motion for a rehearing without opinion (App. B of Petition) are reported at 46 Wis. (2d) 230 and 175 N.W. (2d) 473.

JURISDICTION

The Wisconsin Supreme Court rendered its opinion on April 3, 1970. Rehearing was denied without opinion on June 2, 1970. Judgment was entered June 12, 1970. The petitioner first raised the federal questions presented in his Petition for certiorari in his brief in support of a motion for rehearing in the Wisconsin Supreme Court. The Petition for certiorari does not state on what ground this Court's jurisdiction is invoked. The petitioner apparently seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257 (3).

QUESTIONS PRESENTED

Has the Petitioner timely raised the federal questions in the courts below?

Does the due process clause of the 14th Amendment to the Constitution of the United States of America prohibit the Wisconsin Supreme Court from overruling a prior decision interpreting a state statute?

Does a state, in requiring that a transaction between an attorney and his client be characterized by the utmost honesty and good faith, deprive an attorney of equal protection of the law?

Does one have a federally protected right to make a will; and if so, did the decision below infringe that right?

Is the decision of the Wisconsin Supreme Court based on adequate non-federal grounds precluding further review by this Court?

STATUTE INVOLVED

The statutory provision involved is sec. 238.06 of the Wisconsin statutes. This statute requires all wills to be signed by the testator unless the testator expressly directs some other person to sign on his behalf. The statute is printed in Appendix A of the petition.

STATEMENT OF THE CASE

How Federal Questions Were Presented

The petitioner was Mrs. Evelyn Komarr's attorney and the conservator of her estate. On March 17, 1968, Mrs. Komarr was conveyed by ambulance from a nursing home to Misericordia Hospital in Milwaukee. The admitting diagnosis was cerebrovascular accident probably due to cerebral hemorrhage. The hospital records show that on March 18, Mrs. Komarr's speech was garbled and her left arm and hand were completely flaccid (Objectors Exhibits B and D).

On March 18, 1968, the petitioner retained Attorney Joseph Balistrieri to draft Mrs. Komarr's will. Mr. Balistrieri had previously represented the petitioner in other legal matters (R. 109). The will is a three-page document drafted in longhand by Attorney Joseph Balistrieri (Proponent's Exhibit 1). Mrs. Komarr purportedly signed the instrument by making two x's as her mark. The will was witnessed by Attorney Joseph Balistrieri and Benedetta Balistrieri, his sister and legal secretary. The will left Mrs. Komarr's entire estate to the petitioner and expressly disinherited her son "Joe Vargo." (The actual name of the respondent, Mrs. Komarr's son and sole heir, is George Vargo.)

The testimony of Joseph Balistrieri and Benedetta Balistrieri is in conflict as to the circumstances surrounding the execution of the will. Benedetta Balistrieri testified that her brother made the two x's while Mrs. Komarr's hand was in contact with his hand (R. 68, 90). Joseph Balistrieri testified that Mrs. Komarr made the x's while his hand was on top of her hand (R. 106, 114). Joseph Balistrieri and Benedetta Balistrieri did not remember whether Mrs. Komarr's paralyzed left hand was used (R. 91, 121). Neither Joseph Balistrieri nor Benedetta Balis-

trieri testified that Mrs. Komarr ever requested anyone to make her mark for her or to assist her in making her mark.

The County Court for Milwaukee County, overruling respondent's objections, admitted the will to probate.

The respondent appealed to the Wisconsin Supreme Court and argued that the will had not been executed in conformity with Wis. stat. 238.06 and that the petitioner had procured the execution of the will by exercising undue influence over the testatrix (Document No. 23).

Wis. stat. 238.06 provides:

> "No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and *signed by the testator or by some person in his presence and by his express direction*. . . ." (Emphasis supplied)

In *Will of Wilcox* (1934) 215 Wis. 341, 254 N.W. 529, the court held that a testatrix's touching of a pen while another makes her mark is sufficient participation by the testatrix in the execution of a will, so that she can be deemed to have "signed" the instrument within the meaning of Wis. stat. 238.06.

Respondent argued in the Wisconsin Supreme Court that the *Wilcox* case, *supra*, could be distinguished from the present case (Document No. 23). The petitioner argued that the will had been executed in conformity with Wis. stat. 238.06 as that statute had been interpreted in the *Wilcox* case, *supra*. (Document No. 24). The petitioner did not suggest that the United States Constitution prohibited the Wisconsin Supreme Court from holding that the will had not been executed in conformity with Wis. stat. 238.06.

The Wisconsin Supreme Court overruled its decision in *Will of Wilcox, supra* and held that the testatrix must do something more than merely have her hand in contact with the hand of the person who signs the will; otherwise a completely comatose testatrix could fulfill the requirements of the statute.

In *Will of Faulks* (1945) 246 Wis. 319, 17 N.W. (2d) 423, the court held that a more stringent standard should be applied in determining whether a will was a product of undue influence when a fiduciary relationship existed between the testator and the beneficiary. The petitioner did not argue that the Equal Protection clause of the 14th Amendment prohibited the states from making such a legal distinction between fiduciaries and non fiduciaries. Instead the petitioner cited *Will of Faulks, supra*, five times in his brief in an attempt to distinguish the case from the case at hand (Document No. 24).

The Wisconsin Supreme Court reversed the County Court for Milwaukee County and held: (1) The record showed that as a matter of law the will had not been executed in conformity with Wis. stat. 238.06 as it now interpreted that statute, and (2) The record showed as a matter of law that the petitioner had procured the execution of the will by exercising undue influence over the testatrix.

The petitioner did not raise *any* question arising under the United States Constitution until he submitted his brief in support of a motion for rehearing (Document No. 16). The brief was mainly addressed to questions of state law. The petitioner did make the general suggestion that the decision conflicted with the due process and equal protection clause of the 14th Amendment, but failed to cite any authorities in support of this contention.

ARGUMENT

I.

THE QUESTIONS PRESENTED WERE NOT PROPERLY RAISED BELOW

The petitioner raised federal questions for the first time in his brief on motion for rehearing in the Wisconsin Supreme Court. The Wisconsin Supreme Court does not consider issues raised for the first time on rehearing. *Martinson* v. *Brooks Equipment Leasing, Inc.* (1967) 36 Wis. (2d) 209, 152 N.W. (2d) 849, 154 N.W. (2d) 353; *Uren* v. *Purity Dairy Co.* (1948) 252 Wis. 446, 32 N.W. (2d) 615, 33 N.W. (2d) 213.

This Court does not consider questions raised for the first time in a petition for rehearing in a state court. *Radio Station WOW* v. *Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 569; *Herndon* v. *State of Georgia* (1935) 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530, reh. den. 296 U.S. 661, 56 S.Ct. 82, 80 L.Ed. 471; *American Surety Co.* v. *Baldwin* (1932) 287 U.S. 156, 163, 53 S.Ct. 98, 77 L.Ed. 231; *Godchaux Co.* v. *Estopinal* (1919) 251 U.S. 179, 180-181, 40 S.Ct. 116, 64 L.Ed. 213. General assignments of error, even when timely made, are insufficient to preserve constitutional questions for review. *Marvin* v. *Trout* (1905) 199 U.S. 212, 26 S.Ct. 31, 50 L.Ed. 157.

II.

THE PETITION DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION

1. The Wisconsin Supreme Court has, from time to time, re-examined its prior interpretations of statutes, as have other appellate courts, e.g., *Boys Markets, Inc.* v.

Retail Clerk's Union, Local 770 (1970) —— U.S. ——, 90 S.Ct. 1383, —— L.Ed. (2d) ——. The right of a state court to overrule a prior decision interpreting a state statute is no longer an arguably debatable question of constitutional law. *Lincoln Fireproof Warehouse Company* v. *City of Milwaukee* (1932) 287 U.S. 567, 53 S.Ct. 23, 77 L.Ed. 499; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930) 281 P.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

In *Tidal Oil Co.* v. *Flanagan* (1924) 263 U.S. 444, 44 S. Ct. 197, 68 L.Ed. 382, the Oklahoma Supreme Court overruled prior decisions interpreting state statutes setting forth the requirements for the execution of deeds. This Court said at 263 U.S. 450:

> ". . . The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law. . . ."

2. The petitioner was not denied equal protection of the law. The courts' traditional close scrutiny of any transaction between a fiduciary and the beneficiary of his trust is designed to protect a class peculiarly susceptible to being the victims of fraud and other forms of overreaching. In the present case the petitioner had a fiduciary responsibility toward an old and infirm woman, both as her attorney and as the conservator of her estate. The petitioner proceeded to turn this position of trust to his own advantage. The imposition of special requirements of honesty and good faith on attorneys and other fiduciaries is not wholly irrelevant to the achievement of valid state purposes and thus the petitioner has not been denied equal

protection of the law. *McGowan* v. *State of Maryland* (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. (2d) 393.

In *Schware* v. *Board of Bar Examiners of State of N. M.* (1957) 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. (2d) 796, Justice Frankfurter said in regard to the duties of an attorney:

> ". . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' " (352 U.S. at 247)

3. One of the "natural rights" of man secured by the Wisconsin Constitution is the right to make a will. *Will of Rice* (1912) 150 Wis. 401, 444, 136 N.W. 956. No similar right exists under the United States Constitution. In *Magoun* v. *Illinois Trust & Savings Bank* (1898) 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037, the Court said:

> "(T)he right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege,—and therefore the authority which confers it may impose conditions upon it."

Any right of Mrs. Komarr to make a will was not infringed. The Wisconsin Supreme Court held that the execution of the instrument was not her voluntary act, but the product of undue influence exercised over her by the petitioner.

III.

WHY THE WRIT SHOULD BE DENIED

The decision below is of little interest to anyone other than the parties directly involved. The decision, as in most will contests, turned on the particular facts presented by the record. The petitioner continues to argue in this Court that the Wisconsin Supreme Court misapplied prin-

ciples of state law to the facts in the record in finding the petitioner guilty of fraud. The Due Process clause of the 14th Amendment, however, does not protect the petitioner from an allegedly erroneous application of state law. *Scripto, Inc. v. Carson* (1960) 362 U.S. 207, 210, 80 S.Ct. 619, 4 L.Ed. (2d) 660; *American Ry. Express Co. v. Commonwealth of Kentucky* (1927) 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639.

No procedural error to constitutional proportions is alleged to have occurred in the trial of the case. The petitioner, in claiming that he was denied substantive due process of law, attempts to revive the ghosts of constitutional doctrines long since buried. The power of a state court to re-examine its prior interpretation of a state statute is no longer open to doubt. The power of a state court to closely scrutinize transactions between a fiduciary and the beneficiary of a fiduciary's trust has never been seriously questioned. Neither the holding that the will was not executed in conformity with Wisconsin law nor the holding that the will was the product of undue influence raises any federal question of substance. Each holding is an adequate independent, non-federal ground for the decision below precluding further review by this Court. *Henry v. State of Mississippi* (1965) 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. (2d) 408, reh. den. 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed. (2d) 813; *Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 569; *Lynch v. People of State of New York ex rel. Pierson* (1934) 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. The decision below does not present any important questions of federal law and is not in conflict with any prior decision of this court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent